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FILED

JAN 06 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 09-0601

PHYLLIS JAMISON,)

Plaintiff/Appellant,)

-vs.-)

FRED VAN VALKENBURG,)

MISSOULA COUNTY)

COMMISSION, BILL CAREY,)

COMMISSIONER, JEAN)

CURTISS, COMMISSIONER,)

JAMES MCCUBBIN, DEPUTY)

COUNTY ATTORNEY, DENA L.)

LUND, JACK S. LUND, RICHARD)

B. WHEATLEY, TAMBRY T.)

WHEATLEY,)

Defendants/Appellees.)

**MOTION TO DISMISS
APPEAL**

INTRODUCTION

Pursuant to Mont. R. App. P. 16, Defendants/Appellees Dena L. Lund and Jack S. Lund (hereafter the “Lunds”) hereby move for dismissal of the appeal to the extent that the appeal is against the Lunds. Plaintiff/Appellant Phyllis Jamison (hereafter “Jamison”) has been contacted regarding this motion and objects thereto.

Based on the Notice of Appeal filed by Plaintiff/Appellant Phyllis Jamison, it appears that Jamison is only appealing the district court’s judgment in favor of Defendants/Appellees Fred Van Valkenburg, Missoula County Commission, Bill Carey, Commissioner, Jean Curtiss, Commissioner, James McCubbin, Deputy County Attorney (hereafter, the “County Defendants”). If Jamison is also appealing the judgment against the Lunds, she did not file that appeal within the time prescribed by the rules. As such, the Lunds must be dismissed from the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Jamison filed this action pro se to dispute public decisions regarding a public right-of-way on Woodville Avenue in Clinton, Montana. Pursuant to her Amended Complaint of January 20, 2009, copy attached as **Exhibit 1**,

Jamison filed this action against several public officials as well as the Lunds.

The Lunds are private citizens and Jamison's neighbors.

Based on Mont. R. Civ. P. 12(b)(6) motions filed by Defendants, the district court dismissed all claims against all Defendants on July 6, 2009. Opinion and Or. (July 6, 2009), attached hereto as **Exhibit 2**. The court held that "Plaintiff's Amended Complaint fails to state a viable cause of action against any of the above named Defendants under any set of facts as a matter of law and the Defendants are entitled to have this case against them dismissed." *Id.* at 3.

Thereafter, the Lunds filed a Request for Entry of Judgment on August 6, 2009, attached hereto as **Exhibit 3**, and filed their Notice of Entry of Order of Dismissal on August 12, 2009, attached hereto as **Exhibit 4**. The district court entered Judgment for Defendants Dena L. Lund and Jack S. Lund on August 20, 2009. Judgment (Aug. 20, 2009), attached hereto as **Exhibit 5**. The Lunds served their Notice of Entry of Judgment on August 25, 2009. Lunds' Notice (Aug. 25, 2009), attached hereto as **Exhibit 6**. The district court entered judgment in favor of the County Defendants on all claims. Judgment (Sept. 9, 2009), attached hereto as **Exhibit 7**. The County

Defendants served their Notice of Entry of Judgment on September 15, 2009. County Def. Notice (Sept. 15, 2009), attached hereto as **Exhibit 8**.

Jamison filed her Notice of Appeal on November 7, 2009. Her Notice of Appeal states that she is appealing the “final judgment entered in such action on the 9th day of September, 2009.” Notice of Appeal (Nov. 7, 2009), attached hereto as **Exhibit 9**.

ARGUMENT

Jamison did not appeal the judgment entered in favor of the Lunds. Instead, her Notice of Appeal clearly states that she is appealing the judgment entered in favor of the County Defendants. However, Jamison’s opposition to this motion suggests that she is attempting to appeal the judgment entered in favor of the Lunds as well as that entered in favor of the County Defendants.

Jamison is required to designate in her Notice of Appeal “the final judgment or order or part thereof from which the appeal is taken.” Mont. R. App. P. 4(4)a. This Court has consistently held that it will address appeals only from orders designated in the notice of appeal or “intermediate orders or decisions properly excepted or objected to which involve the merits or necessarily affect the final judgment.” *Glacier Tennis Club at the Summit*,

LLC v. Treweek Const. Co., Inc., 2004 MT 70, ¶ 31, 320 Mont. 351, 87 P.3d 431 (citations omitted). *See also State v. Spotted Blanket*, 288 Mont. 126, 131, 955 P.2d 1347, 1349 (1998) (holding that this Court “will not consider an appeal from an order not designated in the notice of appeal”). Since Jamison only listed the judgment entered in favor of the County Defendants, this Court cannot consider an appeal against the Lunds.

In addition to the Notice of Appeal failing to designate the judgment in favor of the Lunds, Jamison’s Notice of Appeal was filed after the deadline to appeal the judgment in favor of the Lunds. Under Mont. R. App. P. 4(2)c., “the timely filing of a notice of appeal or cross-appeal is required in order to invoke the appellate jurisdiction of the supreme court.” Since some of the Defendants in this matter are governmental entities or officers, Jamison had to file a notice of appeal “within 60 days from the entry of the judgment or order from which appeal is taken.” Mont. R. App. P. 4(5)a.i. Before the deadline to file a notice of appeal begins to run, the prevailing party must serve a notice of entry of order or judgment pursuant to Mont. R. Civ. P. 77(d). Mont. R. App. P. 4(5)a.i.; *see also Reedal v. Reedal*, 2008 MT 151, ¶¶ 5, 7, 343 Mont. 235, 183 P.3d 122 (granting motion to dismiss appeal as notice of appeal not

actually filed until one day after deadline); *In re Parenting of K.P.*, 2005 MT 297, ¶ 13, 329 Mont. 337, 124 P.3d 1091 (holding that Mont. R. Civ. P. 77(d) notice must be given by either party before the deadline to file a notice of appeal begins to run).

In this case, the district court dismissed all claims against all Defendants through its July 6, 2009 Opinion and Order of Dismissal. Defendant Lunds' Notice of Entry of Order of Dismissal was served on August 12, 2009. This Court has held that the time within which to file a notice of appeal begins to run from notice of entry of an order that is final and appealable. *In re Estate of Pegg*, 209 Mont. 71, 78, 680 P.2d 316, 319 (1984). In this case, Jamison had 60 days from the Lunds Notice of Entry of Order of Dismissal to file an appeal. Thus, she would have had to file a notice of appeal by October 12, 2009. Since she did not file her Notice of Appeal until November 7, 2009, any appeal against the Lunds is time-barred.

Defendant Lunds' Notice of Entry of Judgment was filed on August 25, 2009. Even if that notice, rather than the earlier Notice of Entry of Order of Dismissal, started the deadline within which Jamison had to file a notice of appeal, her appeal is still time-barred. Jamison had to file a Notice of Appeal

within 60 days of the Notice of Entry of Judgment, or by October 26, 2009.

By failing to file a Notice of Appeal until November 7, 2009, any appeal against the Lunds is time-barred and must be dismissed.

CONCLUSION

Based upon the foregoing, the Lunds respectfully request that this Court dismiss Jamison's appeal against the Lunds because she did not designate the judgment in favor of the Lunds in her Notice of Appeal. In the alternative, the Lunds respectfully request that this Court dismiss Jamison's appeal against the Lunds because her Notice of Appeal was not filed within the deadline and is time-barred.

DATED this 5th day of January, 2010.

PHILLIPS LAW FIRM P.C.
Attorneys for Appellees Lunds

By


Paul Sharkey

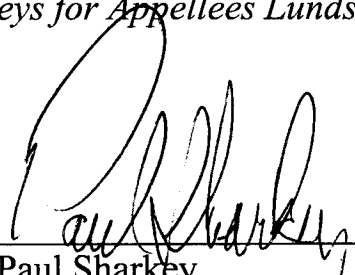
CERTIFICATE OF COMPLIANCE

Pursuant to Rule **16(3)** of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2003, is not more than 1,250 words, excluding certificate of service and certificate of compliance.

DATED this 5th day of January, 2010

PHILLIPS LAW FIRM P.C.
Attorneys for Appellees Lunds

By


Paul Sharkey

CERTIFICATE OF SERVICE

I, the undersigned, a representative of the law firm of Phillips Law Firm P.C., hereby certify that on this 5th day of January, 2010, I served a true and complete copy of the foregoing "*Motion to Dismiss Appeal*" by depositing the same in the United States Mail, postage prepaid thereon, addressed as follows:

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